No. 14848

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OXNARD CITRUS ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

OXNARD CITRUS ASSOCIATION,

Respondent.

Petition for Review and Petition for Enforcement of Order of National Labor Relations Board.

Brief of Petitioner, Oxnard Citrus Association.

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Preliminary Statement.

A. Jurisdiction.

The matter to which review is sought consists of a Decision and Order dated April 13, 1955 [Tr. 74-76],[1]

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[1]Transcript of Record.

made by the National Labor Relations Board (hereinafter called the "Board") in a proceeding entitled Oxnard Citrus Association (hereinafter called "Petitioner") and United Fresh Fruit & Vegetable Workers, LIU No. 78, CIO (hereinafter called the "Fruit & Vegetable Union") case number 21-CA-1909, holding that Petitioner had committed unfair labor practices and had refused to bargain with said union.

The Petition praying that the Order of the Board be set aside was filed under the provisions of Section 101.14 of the Rules and Regulations of the Board, and under the provisions of Section 10(f) of the Labor Management Relations Act, 1947, and in compliance with Rule 34 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended effective January 1, 1949.

The above Act of Congress, approved June 23, 1947, known and designated as the "Labor Management Relations Act, 1947" (29 U. S. C. A., Sec. 141), provides as follows as to review of this Order:

> "Sec. 10(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside." (29 U. S. C. A., Sec. 160(f).)

B. Statement of the Case.

Petitioner is a California cooperative nonprofit association with its principal place of business in Port Hueneme, California, where it is engaged in processing and packing citrus fruits [Tr. 11, 14-15].

On November 4, 1953, Petitioner's employees elected said Fruit & Vegetable Union as their bargaining representative [Tr. 6]. On November 13, 1953, the Board certified said Fruit & Vegetable Union as the employees' exclusive bargaining representative [Tr. 8-9].

Bargaining meetings were held between Petitioner and said Fruit & Vegetable Union on December 2, 7, 15, 1953, January 7 and 14, 1954 [Tr. 60]. At the January 14, 1954 meeting an impassé was reached on the union shop question and bargaining was discontinued [Tr. 140-142]. On February 16, 1954, a petition signed by 65% of the employees and repudiating said Union was served on Petitioner [Tr. 62, 23-25]. Charges were filed by said Fruit & Vegetable Union against Petitioner on January 28, 1954, alleging refusal to bargain with said Union [Tr. 9-10]. Complaint was issued by the Board on or about May 27, 1954 [Tr. 11-14] and hearing was had before Trial Examiner Wallace E. Royster, in Oxnard, California, on September 27 and 28, 1954 [Tr. 59].

Petitioner filed written Exceptions to the Trial Examiner's Findings that Petitioner had committed unfair labor practices: (1) by refusal to bargain with said Fruit & Vegetable Union and subsequently with the United Pack-

inghouse Workers of America, Local 78, CIO (herein after referred to as the "Meatpackers Local") and (2) by granting a unilateral wage increase; and to his Recommendations that Petitioner, in the future, bargain with the said Meatpackers Local [Tr. 73-74].

The Board affirmed the Rulings and Recommendations of the Trial Examiner and ordered Petitioner to bargain with the said Meatpackers Local [Tr. 74-77].

Petitioner thereafter filed its Petition for Review with the above entitled court [Tr. 82].

C. Specifications of Error.

The Board erred in affirming the Findings, Conclusions and Recommendations of the Trial Examiner as follows: (1) that said Meatpackers Local is the exclusive bargaining representative of Petitioner's employees; (2) that Petitioner committed unfair labor practices by refusal to bargain with the said Meatpackers Local; (3) in recommending that in the future Petitioner bargain with said Meatpackers Local; (4) that Petitioner committed unfair labor practices by making unilateral wage increases; and (5) that Petitioner engaged in unfair labor practices within the meaning of 8(a) (1) and (5) of the Labor Management Relations Act [Tr. 74].

ARGUMENT.

I.

The Union Is Not the One Elected by the Employees and Is Not a Bargaining Representative of the Employees' "Own Choosing."

Employees have the statutory right "to bargain collectively through representatives of their own choosing." Section 7, Labor Management Relations Act, 1947, 29 U. S. C. A., Sec. 157).

The instant point is presented in support of Petitioner's Exceptions to the Board's Findings and Conclusions that Petitioner committed unfair labor practices by refusal to bargain with said Meatpackers Local and to the Board's Order that Petitioner:

> ". . . Upon request, bargain collectively with United Packinghouse Workers of America, Local 78, CIO, as the exclusive representative of the employees in the appropriate unit described above, and if an understanding is reached embody such understanding in a signed agreement." [Tr. 76.]

The Unions involved herein, namely, the United Fresh Fruit & Vegetable Workers, LIU No. 78, the United Packinghouse Workers of America, CIO, an international union, and United Packinghouse Workers of America, Local 78, CIO, are the same unions that are referred to in the related case of Santa Clara Lemon Association, No. 14840.

The facts in this case are substantially the same on the above issue as the facts in the Santa Clara case. In the instant case the Board approved the substitution of the

Meatpackers' Local "For the reasons set forth in Santa Clara Lemon Association," etc. [Tr. 75, footnote 1].

Therefore, we incorporate herein by reference and make a part hereof as though set forth herein in full the argument appearing on pages 5 through 24 of the Brief of Petitioner, Santa Clara Lemon Association, filed with the above entitled court on or about December 31, 1955, in Case No. 14840.

For the reasons heretofore stated the Board's Order that Petitioner bargain collectively with said Meatpackers Local is contrary to law and in violation of the rights of the employees in the bargaining unit, and the Board's finding that Petitioner failed and refused contrary to the Act, to bargain with said Meatpackers Local should be reversed.

II.

Granting the Unilateral, General Wage Increase Did Not Constitute an Unfair Labor Practice.

It was stipulated that general wage increases were granted on March 8, 1954, and on April 19, 1954 [Tr. 126]. Petitioner admits that it did not consult the Union about the wage increase [Tr. 15, par. III].

The reasons for the wage increases and the circumstances surrounding them were explained in Petitioner's offer of proof [Tr. 162-163]. It is undisputed that there were no meetings between any Union and Respondent after January 14, 1954 [Tr. 158].

The Petitioner stood between the demands of the Fruit & Vegetable Union on one side, and the demands of a majority of its employees on the other. Wage adjustments were made to meet the competition of other packing houses. The new wage rates were ascertained by check-

ing with other packing houses to determine what they were paying. The wage increases were made retroactive to September 21, 1953, because that was the approximate time when competitive houses had made wage increases [Tr. 62].

The Trial Examiner considers that the purpose for which the wage increases were given is immaterial [Tr. 64]. The Board has not been so arbitrary. It has held that unilateral wage increases may be made when bargaining negotiations were in suspension.

In regard to the effect of a suspension of negotiations the Board declared:

> "In these circumstances the Respondent was under no duty to withhold normal action respecting wages pending consultation with the Union." (*Montgomery Ward & Co.,* 39 N. L. R. B. 229; *Westchester Newspapers, Inc.,* 26 N. L. R. B. 630)

In the instant case we have negotiations suspended both by an impassé and as a result of the conflicting demands of the Fruit & Vegetable Union on one side and of a majority of the employees and unusual circumstances on the other. How soon the difficulty would be resolved by the Board or by a court, or both, could not be foreseen. It might take a month, a year, or even two or three years. In the meantime the employees would be deprived of wage increases. Petitioner's labor supply would be jeopardized by its inability to meet competitive wage rates. Should both the employees and Petitioner be penalized by a frozen wage scale throughout the period necessary to resolve the legal conflict?

Petitioner did the only thing it reasonably could do under the circumstances. It made unilateral wage increases.

For each of the foregoing reasons the Board's finding that Petitioner committed an unfair labor practice by making a general wage increase without consulting the Union, is contrary to the law and should be reversed.

III.

Bargaining Had Reached a Genuine Impassé, and Petitioner's Refusal to Bargain Further Was Not an Unfair Labor Practice.

The evidence is undisputed that bargaining meetings between the Fruit & Vegetable Union and Petitioner were held on December 2, 7, 15, 1953, and January 7 and 14, 1954 [Tr. 100, 102, 104, 107, 127, 131, 133, 137-138].

First Meeting—December 2, 1953.

The Fruit & Vegetable Union distributed copies of the proposed contract [G. C. Ex. 3], and each article in the proposal was read and explained by said Union [Tr. 101-102, 127, 143]. Rose pointed out that all of said Union's existing contracts had a "Union shop" provision [Tr. 119]. The Union security and seniority provisions were discussed [Tr. 127-129]. Petitioner pointed out that maintenance of membership might be acceptable [Tr. 132]. Said Union pointed out that its members stood on the demand for a Union shop clause [Tr. 120]. It was indicated that the proposals on grievance procedure, arbitration, leaves of absence, men in the Armed Forces, safety, no strike—no lock-out, and some portions of the seniority clause could be worked out with little, or no difficulty [Tr. 121, 129]. There was no request by said Union or refusal by Petitioner to discuss wage rates [Tr. 117, 131].

Second Meeting—December 7, 1953.

The said Union proposal was reconsidered, and the sections entitled "Recognition," "Union Security" and "Representation" were discussed [Tr. 103-104]. Most of the meeting was devoted to discussing Union security [Tr. 104]. The Fruit & Vegetable Union pointed out that the "Union Security" clause was the most important clause in the whole contract [Tr. 132]. Petitioner explained its position on the Union shop question [Tr. 132-133]. Petitioner submitted a counterproposal on "Recognition" [Tr. 132, 145]. There was no discussion on wages, nor a demand by said Union nor refusal by Petitioner to discuss them [Tr. 133].

Third Meeting—December 15, 1953.

Petitioner submitted a revised counter-proposal on "Recognition" [Tr. 134, 105], and that section was settled [Tr. 134]. Union shop was discussed again [Tr. 118-119]. Smith, president of the Fruit & Vegetable Union, said that the Union was not interested in a maintenance of membership clause, and that he would not recede from the demand for a Union shop clause because the Fruit & Vegetable Union now had 300 contracts in existence, all of which had the Union shop provision [Tr. 135, 156]. When compromise was suggested, Smith said that he would not compromise on the Union shop question, and explained that you don't have to compromise if you feel you are right [Tr. 136].

Fourth Meeting—January 7, 1954.

Petitioner complained about the Union taking such an adamant position on the Union shop question. No progress was made on the issue, but it was finally agreed

that the Fruit & Vegetable Union submit the matter to its members and the Petitioner submit the matter to its Board of Directors to see if some basis for agreement could be reached [Tr. 137-138, 150].

Fifth Meeting—January 14, 1954.

Petitioner submitted counter-proposals on "Representation," "Union Security," and "Seniority" [G. C. Exs. 5, 6, 7], each of which was discussed [Tr. 108, 111, 140, 145]. Rose was asked if the Fruit & Vegetable Union had submitted the Union shop question to its membership as agreed at the last meeting [Tr. 139, 151]. Union representative Rose, who was absent from the fourth meeting [Tr. 120], stated that he had no knowledge of any such agreement, and Fruit & Vegetable Union representative Garcia stated that he had forgotten about it [Tr. 138, 152]. The Fruit & Vegetable Union stood pat on its Union shop demand, and Petitioner expressed its dissatisfaction with the Union's failure to resubmit the Union shop question to its members as agreed [Tr. 139, 152-153]. Petitioner had submitted the Union shop question to its Board of Directors, as agreed, and the Board indicated that it would not accept the Union shop proposal as offered by the Fruit & Vegetable Union, but that its negotiating committee should try to work out a compromise with said Union or find some common ground for agreement [Tr. 131, 150].

Petitioner indicated that agreement could be reached with little difficulty on recognition, representation, grievance procedure, arbitration, check-off, Armed Forces and transportation [Tr. 140].

Petitioner pointed out that the parties seemed to be getting no where on the Union security question; that

the parties keep coming back to that question, and seem to be up against a stone wall; and that Petitioner saw no use to continue arguing about the same thing or going back over the same ground that had been covered time and time again [Tr. 140-141]. Petitioner was asked if it was breaking off negotiations and replied that it was not breaking off negotiations but could see no use in arguing on the same point and saw no reason for continuing unless the said Union had something new to propose [Tr. 141-142].

Meetings Generally.

There were no meetings between the Fruit & Vegetable Union and Petitioner after January 14, 1954 [Tr. 158]. Prior to January 14, 1954, there was no refusal by Petitioner to meet with the Union [Tr. 125]. There was no refusal by Petitioner to discuss wages [Tr. 125].

The Fruit & Vegetable Union had requested that Petitioner present a full set of counter-proposals [Tr. 148-149, 160]. Petitioner explained why it would not present a complete set at one time [Tr. 149-150, 160]. However, counter-proposals were submitted on the most important subjects, including "Recognition" [Tr. 105], "Representation", "Union Security", and "Seniority" [Tr. 107-108, 111; G.C. Exs. 5, 6, 7]. The section which the Union said was most important to it was "Union Security" [Tr. 132]. Counter-proposals were submitted on each of the sections which was discussed following the first reading of the Union proposal [Tr. 146]. There was no refusal by Petitioner at any time to submit a counter-proposal on a specific subject [Tr. 160]. It is true that counter-proposals had not been submitted on "Working Conditions," "Vacations," "Hours and

Overtime," "Combination Job," "Wages" and "Insurance and Pensions," but that was merely because negotiations had not progressed to those subjects [Tr. 146-147].

The Union shop question had been discussed, passed over, and discussed again on five or six occasions [Tr. 159, 148-149]. The Fruit & Vegetable Union had said on more than one occasion that it would not recede from its demand for a Union shop [Tr. 135-136, 156-157; G. C. Ex. 10, Tr. 54].

The Trial Examiner finds that:

> "It may be, as the Respondent alleges, that bargaining on this matter had reached a point where further discussion made no promise of agreement." [Tr. 63.]

Petitioner submits that when the Union shop question had been discussed and then passed over to other subjects in the contract and then discussed again, this having occurred five or six times with the Union's refusal to recede from its demand for a Union shop, Petitioner was justified in abstaining from further negotiations. Nothing in the law requires that there be either an impassé or agreement on any or all other subjects of the contract before negotiations can be terminated by impassé on a given subject—especially on one as important as the Union shop question.

Although certain exemptions were demanded by Petitioner for the farm families of member-growers, that was a small factor in the Union security issue, and still a smaller factor in the seniority question [Tr. 154, 159]. Petitioner had at no time said that it would not recede or compromise on the farm family matter [Tr. 155].

In *N. L. R. B. v. Cambria Clay Products Co.* (C. A. 6, 1954), 215 F. 2d 48, 55, there was an impassé as a result

of a deadlock on the Union shop issue. In holding that employer did not refuse to bargain, the court said:

". . . There was no refusal on the part of the company—after four months of negotiations—to bargain with the Union in violation of the Act, for 'the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position.' *National Labor Relations Board v. American National Insurance Co.,* 343 U. S. 395, 404, 72 S. Ct. 824, 829, 96 L. Ed. 1027."

* * * * * * * *

"When a genuine impassé is reached, an employer, unless conditions change, usually may abstain from further negotiations. National Labor Relations Board v. Norfolk Shipbuilding and Drydock Corp., 4 Cir., 195 F. 2d 632, 635."

* * * * * * * *

"As said by Judge Learned Hand in National Labor Relations Board v. Remington-Rand, Inc., 2 Cir., 94 F. 2d 862, 872: 'the act does not attempt to settle industrial disputes; it leaves the parties to the resultant of their opposed economic powers; and while it does force them to treat with each other, it may be assumed to contemplate only bona fide negotiation. Hence it is no doubt true that it does not require further negotiation after it becomes apparent that a settlement is impossible. A Union may at times seek to give the appearance of wishing to treat, after it knows that all chance of agreement is gone; in such conflicts each side generally wishes to place the odium of rupture upon the other. Assuming, as urged by the Board, that a closed shop demand is a proper subject for bargaining, we do not believe that respondent was required to continue the discussion indefinitely. Both sides had endeavored for many months to agree and they were unable to do so.

Neither side was required to accept the proposal made by the other. The same thing may be said for other matters in dispute, which had long been considered and discussed by the parties. As stated, the occurrences of this date, when taken into consideration with what had preceded, as must be done, do not justify the conclusion of a refusal to bargain.' National Labor Relations Board v. Algoma Plywood & Veneer Co., 7 Cir., 121 F. 2d 602, 606."

In *N. L. R. B. v. Algoma, etc.* (C. A. 7), 121 F. 2d 602, 606, where the deadlock was on the "closed shop" issue, the court held that there was no refusal to bargain and stated:

"During that period, as pointed out by the Board, numerous proposals and counter-proposals were made. The main stumbling block appears to have been the matter of the closed shop. Respondent proposed one kind of closed shop which the Union was either unable or unwilling to consummate, and the Union proposed another character of closed shop to which respondent would not agree. The Board states in its brief: '* * * When the Union's proposals reached the conference table for collective bargaining on June 13, 1939, it at once became apparent that respondent persisted in the same motives, rendering any genuine collective bargaining impossible. * * *'

"The fallacy of this reasoning is that the proposal had been on the conference table for 11 months.

"As we understand, the Union proposals at the June 13 conference were substantially the same as those proposed in numerous conferences prior thereto. In fact, one of the Union members testified, 'We were instructed to take that agreement back to Mr. Perry,' thereby referring to the previous proposal. A member of the bargaining committee testi-

fied that the conversation on this date was about the same as that had at previous conferences. In fact, as already stated, and as found by the Board, such bargaining conferences had continued over a period of 11 months. The length of time an employer must continue to bargain in order to demonstrate its good faith, we do not know, but certainly the time is not indefinite. Assuming, as urged by the Board, that a closed shop demand is a proper subject for bargaining, we do not believe that respondent was required to continue the discussion indefinitely. Both sides had endeavored for many months to agree and they were unable to do so. Neither side was required to accept the proposal made by the other. The same thing may be said for other matters in dispute, which had long been considered and discussed by the parties. As stated, the occurrences of this date, when taken into consideration with what had preceded, as must be done, do not justify the conclusion of a refusal to bargain."

In *N. L. R. B. v. Lightner Publishing Co.* (C. A. 7), 113 F. 2d 621, the court pointed out that the employer is not under a duty to accede to whatever particular terms may be sought by the Union, but merely to accord recognition to the bargaining representatives of the employees and conduct negotiations in good faith in an honest attempt to arrive at a mutually satisfactory agreement.

In *Shell Oil Co., 77* N. L. R. B. 1306, the Board held that inability to agree on one particular issue does not constitute refusal to bargain in good faith. In that case the employer met with the Union, discussed all proposals and counter-proposals and reached agreement on a substantial number of issues.

In *Southern Prison Co.,* 46 N. L. R. B. 1268, the Board found that there was no refusal to bargain in good faith where the company considered the Union's proposals, offered counter-proposals and even though the company had granted individual wage increases during the period of the negotiations, which were made without discrimination and pursuant to a long established policy of the company.

In *Kentucky Tennessee Clay Co.,* 49 N. L. R. B. 252, the Board held that there was no refusal to bargain where the parties were hopelessly deadlocked on the Union shop, seniority and arbitration issues.

In *Anchor Rome Mills, Inc.,* 86 N. L. R. B. 1120, the Board held that there was no failure to bargain where there was an impassé with respect to check-off, super-seniority for shop steward and union liability for strikes.

For each of the above reasons it is apparent that the Board's findings on said issue are not based on substantial evidence and should be reversed.

Respectfully submitted,

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